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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

BANYAN LIMITED PARTNERSHIP et al., Plaintiffs and Appellants, v. DAN W. BAER et al., Defendants and Respondents.	G045584 (Super. Ct. No. 764271) O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, Thierry P. Colaw, Judge. Affirmed.

Law Offices of Dennis Hartmann and Dennis Hartmann; The Dressler Law Group and Thomas W. Dressler, Snell & Wilmer, Richard A. Derevan and Todd E. Lundell for Plaintiffs and Appellants.

Enterprise Counsel Group, Benjamin P. Pugh, Teddy Davis, and David A. Robinson, for Defendant and Respondent Dan W. Baer.

Schadrack & Chapman and C. Michael Chapman for Defendants and Respondents Dan W. Baer, IBT International, Inc., and Southern California Sunbelt Developers, Inc.

INTRODUCTION

This litigation has spanned almost two decades. The original complaint, filed in 1996, arises out of business dealings between Dan W. Baer and an attorney, David H. Tedder, during the late 1980s and early 1990s. It began as an action filed by Tedder as general partner of a multitude of Nevada limited partnerships he created for clients as part of "asset protection" services he provided for those clients. Tedder sued on behalf of the limited partnerships to recover on loans they allegedly made to Baer's corporations, IBT International, Inc. ("IBT") and Southern California Sunbelt Developers, Inc. ("SCSD") (hereafter "Defendants" unless the context indicates otherwise), to acquire real estate owned by the corporations, but in which Tedder claimed he and Baer were to be partners. Defendants and Tedder cross-complained against each other seeking to determine their respective interests in the real estate and their other business pursuits, which included Tedder's law firm from which the two men had agreed to equally split the profits. The action ended up as one asserting that Baer, as a non-lawyer partner in Tedder's law firm, was liable for Tedder's breaches of fiduciary duties to the three law firm clients who funded the limited partnerships, and who claimed they had each lost millions of dollars entrusted to Tedder as a result of Tedder's making self-interested loans of their money.[1]

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[1] Although there were 19 named plaintiffs in the original complaint, by the end only seven (related to the three clients) remained and those seven limited partnerships are the appellants here. They include: Banyan Limited Partnership (Banyan), Pear Tree Limited Partnership (Pear Tree), and Orange Blossom Limited Partnership (Orange Blossom), formed on behalf of Don Grammer and his family (hereafter sometimes referred to collectively as the Grammer Limited Partnerships); CTM Limited Partners (CTM), Selvin Limited Partnership (Selvin), and Trails End Limited Partnership (Trails End), formed on behalf of Richard McGrath and his family (hereafter sometimes referred to collectively as the McGrath Limited Partnerships); and Birch International Investment Limited Partners (Birch), formed on behalf of Dan Schoenman. (All the appellants will hereafter be collectively referred to as Plaintiffs unless the context indicates otherwise.)

The action has been tried in four separate phases over seven years before different judges in the superior court. It has already been the subject of two prior appeals in this court (*Banyan Limited Partnership et al. v. Baer et al.* (Feb. 7, 2007, G036089) [nonpub. opn.]; *Castlerock Limited Partnership et al. v. Baer et al.* (Dec. 12, 2001, G026308) [nonpub. opn.]),[2] not to mention the plethora of lawsuits throughout the nation in state courts and federal courts involving many of the entities and individuals connected to this action. In one of the phases of trial, the trial court found Baer's corporations, IBT and SCSD, were responsible for five loans made by the Grammer Limited Partnerships totaling about $1.1 million that were evidenced by promissory notes. In another phase, the trial court determined Tedder had no interest in any of the real estate owned by IBT or SCSD, and although Tedder and Baer were partners in Tedder's law firm, neither could recover anything from the other. And in the final phase, the court found Plaintiffs' breach of fiduciary duty cause of action against Baer was time barred and they failed to prove Baer breached any fiduciary duties towards them.

Currently before us are three separate appeals filed after judgment was entered after the final phase of trial. In this appeal, *Banyan Limited Partnership et al. v. Baer et al.* G045584 (*Banyan 1*), Plaintiffs appeal from the final judgment. In *Banyan Limited Partnership et al. v. Baer et al.* (Aug. 12, 2013, G045797) [nonpub. opn.] (*Banyan 2*), Baer appeals from the postjudgment order granting the Grammer Limited Partnerships' new trial motion and modifying the statement of decision allowing the Grammer Limited Partnerships to pursue a postjudgment motion to add Baer as a judgment debtor as an alter ego of his corporations; and in *Banyan et al. v. Baer et al.* (Aug. 12, 2013, G046428) [nonpub. opn.] (*Banyan 3*), the Grammer Limited Partnerships

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[2] On the court's own motion, we take judicial notice of our unpublished opinions in these cases. (Evid. Code, § 452, subd. (d); Cal. Rules of Court, rule 8.1115(b)(1).)

and Baer and SCSD both appeal from the postjudgment order denying attorney fees related to the second phase trial.

In this appeal, we conclude the trial court properly found the one-year statute of limitations applicable to breach of fiduciary claims against an attorney (Code Civ. Proc., § 340.6) applies and bars Plaintiffs' breach of fiduciary claims against Baer. Accordingly, we affirm the judgment.

FACTS & PROCEDURE

In 1985, Tedder was managing partner of his law firm[3] and Baer, a non-attorney businessperson/real estate investor, owned SCSD. Baer retained Tedder to devise an asset protection/estate plan for him that involved creation of several offshore Baer-owned trusts and a Cook Island corporation. (*Banyan Limited Partnership et al. v. Baer et al., supra*, G036089, p. 3.)

In 1986, Tedder and Baer orally agreed to combine their efforts, in what they called a joint venture, to market and mass-produce similar estate planning/financial plans for wealthy individuals through Tedder's law firm. They agreed Tedder would perform the legal services and Baer would manage the law firm.

Tedder and Baer agreed the law firm profits would be split equally between them and used to invest in real estate ventures that Baer would oversee and manage. (*Banyan Limited Partnership et al. v. Baer et al., supra*, G036089, pp. 3-4.) Tedder formed the corporation IBT to be the holding company for those real estate investments. Baer owned 99 percent of the IBT stock, and Tedder owned one percent of IBT stock.[4]

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[3] The law firm has had many names over the years reflecting ever-changing attorney partners, none of whom were named in this action, but for convenience we will refer to it as the law firm.

[4] A third corporation, the Legal Forum, Inc., was formed to conduct asset protection seminars and publish related materials. Legal Forum was a named plaintiff in this action. But the stock in Legal Forum was all issued to Baer's corporation, IBT, which led the trial court to ultimately conclude Baer controlled Legal Forum and Tedder

Both men testified the law firm profits, and the profits from any real estate ventures, were to be equally divided between them. The court eventually found that because of the profit sharing agreement, Baer was Tedder's "partner-in-fact" in the law firm, an arrangement that violated California Rules of Professional Conduct, rule 1-320 [attorney prohibited from directly or indirectly sharing legal fees with non attorney] (see also California Rules of Professional Conduct, rule 1-310 [attorney prohibited from forming partnership with non attorney if partnership activities include practice of law]).

Between 1986 and 1996, the law firm had many clients but never turned a profit. Baer contended Tedder siphoned off all the profits for his personal use; Tedder contended there were no profits because so much of the law firm's time was spent on Baer-related litigation matters, which Baer expected the law firm to handle for free. In any event, all agree there were no law firm profits to invest in real estate. Nonetheless, IBT and/or SCSD acquired three pieces of property using Baer's personal money and money borrowed from some of Tedder's clients: (1) an undeveloped 7,500 acre ranch in Kern County ("the Ranch") acquired by IBT in 1989; (2) an office building in Anaheim ("the Katella Building") acquired by IBT in 1990; and (3) an office park called the John Wayne Executive Guild Building ("the Guild") acquired by IBT or SCSD in 1993.

At some point in the late 1980s, Tedder began providing expanded "asset protection services" for wealthy clients, including Don Grammer, Richard McGrath, and Dan Schoenman. Tedder created numerous limited partnerships (referred to throughout these proceedings as "controlled accounts") for these clients of which Tedder (via entities he owned) was general partner with complete control over the funds. Tedder would then engage a "labyrinthine use of [the] 'controlled accounts' to move clients' money around the world in various financial institutions and vehicles" to protect (i.e., hide) the clients' assets from current and potential creditors. Tedder used some of these client funds

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had no authority to sue Baer on Legal Forum's behalf. There are no further issues in this case concerning Legal Forum.

(including Plaintiffs' funds) to make loans to IBT and SCSD to fund acquisition of the real estate in which he and Baer were supposedly partners.[5] Although Plaintiffs maintain Baer was intricately involved with Tedder's controlled account scheme, and as Tedder's law firm partner he is liable for their alleged losses, the trial court ultimately found Baer played no role in the creation or management of the controlled accounts.

The Litigation Begins in 1996

Original Complaint

The Tedder/Baer partnership fell apart in March 1996, as will be described in more detail, anon. On May 24, 1996, Tedder as attorney for 15 limited partnerships and four corporations filed a complaint against Defendants. Most of the original limited partnership and corporate plaintiffs were eventually dismissed because they lacked capacity to sue and in an earlier opinion, we affirmed the dismissals (*Castlerock Limited Partnership et al. v. Baer et al., supra,* G026308), leaving the seven remaining Plaintiffs.

The original complaint alleged Tedder and Baer formed a "business arrangement" in 1989 to invest in real estate, with financing Tedder would obtain. Plaintiffs alleged they loaned money to Defendants to purchase real estate including the Guild and the Ranch. The original complaint alleged Baer agreed the proceeds from the real estate investments would be used first to pay off the loans and second to pay off any other obligations, and thereafter, the profits would be split equally between Tedder and Baer.

The original complaint alleged Baer, individually and on behalf of IBT and SCSD, had repudiated the loan agreements, was using the cash flow from the properties for his own benefit, and was not repaying the loans as agreed. The complaint attached a

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5 During the course of this litigation, Tedder lost his law license in a disciplinary proceeding relating to different law firm clients but involving the same asset protection scheme, filed for bankruptcy, was convicted of several federal felonies relating to an illegal gambling operation, and was serving a federal prison sentence by the time the final phase of this litigation was tried.

detailed list of the loans alleged to have been made to Baer, IBT, and SCSD and the dates each loan was made. The alleged total of all the loans made to IBT and SCSD by all the original plaintiffs was $4,109,820.

The original complaint contained causes of action against Defendants for money lent, seeking to recover all amounts loaned; for fraud and deceit and unjust enrichment, alleging Baer was improperly diverting cash flow and equity in the properties (through new loans and encumbrances) for his own use; and for judicial foreclosure, seeking imposition of an equitable lien on the properties.

Amended Complaints

The first amended complaint was filed almost three years later in March 1999. Tedder was no longer representing Plaintiffs, but all were now represented by attorney Terry M. Moshenko. The first amended complaint contained the same basic allegations as the original complaint about loans from Plaintiffs to Defendants, described as orally agreed to “conditional demand loans,” for real estate acquisition, but added allegations about an agreement between Baer and Tedder that Baer would manage Tedder’s law firm and be compensated with one-half of the law firm’s profits. The first amended complaint alleged an implied term in the Tedder/Baer agreement was that Baer would act as a “trustee” of Tedder’s interests in the law firm, and as “trustee” of Plaintiffs’ interests (as lenders) and Tedder’s interests (as partner) in the real estate acquired with the loan proceeds. The first amended complaint added a cause of action for breach of fiduciary duty containing a general allegation there was a fiduciary relationship between Defendants and Plaintiffs and Defendants breached that duty. The first amended complaint also added alter ego allegations, i.e., that each corporate defendant (IBT and SCSD) was a “sham” corporation acting as alter egos of the individual defendant (Baer).

In April 1999, Moshenko filed Tedder’s cross-complaint against Defendants containing many of the same allegations and causes of action as Plaintiffs’ complaint. Numerous amended pleadings were filed over the next several years.

The Grammer Family's Texas Lawsuit

Meanwhile, while this litigation was pending, sometime in the late 1990s, the Grammer family filed an action against Tedder in their home state of Texas, alleging Tedder had defrauded them of millions. The plaintiffs in the Texas action included all the individual members of the Grammer family (Don Grammer, his wife Brenda, and his children Daralyn and Greg) and numerous limited partnerships including those remaining as plaintiffs in this action—Banyan, Pear Tree, and Orange Blossom. The defendants included Tedder, his wife, and various Tedder-related entities; Baer, IBT, and SCSD; and Gary Case (a certified public accountant who worked with Tedder and Baer). In 2000, Case, Baer, IBT, and SCSD, succeeded in getting dismissed from the Texas action due to lack of personal jurisdiction. (See *Case v. Grammar* (Tex. Ct. App. 2000) 31 S.W.3d 304, 306.)

In 2001, the Grammer family settled with Tedder and his related entities including his law firm. The Grammers were represented by their current counsel, Dennis Hartmann, and Tedder was represented by attorney Moshenko. The settlement basically called for Tedder to assign part of his interests in this litigation to the Grammer family, and the Grammer family released all claims against Tedder and his entities including his law firm. Sometime after settlement of the Grammers' Texas lawsuit, attorney Hartmann undertook representing *all* Plaintiffs in this action (i.e., the Grammer Limited Partnerships, the McGrath Limited Partnerships, and Birch), and Tedder on his cross-complaint against Defendants.

This Litigation Continues

Pre-Phase 2 Summary Adjudication Motion

This case was originally assigned to Judge William F. McDonald. In January 2001, Baer and IBT and SCSD filed separate motions for summary adjudication of several causes of action in Plaintiffs' complaint and Tedder's cross-complaint, including Plaintiffs' breach of fiduciary duty cause of action, on the grounds there was no fiduciary duty between them and Plaintiffs. In their moving papers, Defendants argued the only fiduciary duty Plaintiffs alleged was one arising from the debtor/creditor relationship between Defendants and Plaintiffs, which as a matter of law could not give rise to a fiduciary duty. IBT and SCSD's motion added the only possible fiduciary relationship involved in this case was between Baer and Tedder as a result of their joint venture. In the Grammer Limited Partnerships' opposition to Baer's motion, filed by their current attorney Hartmann (there were apparently no appearances by the other plaintiffs on this first summary adjudication motion), they specifically "concede[d] that no fiduciary relationship exists *vis-à-vis* . . . Baer." In their opposition to IBT and SCSD's motion, they specifically "[did] not dispute" Defendants' contention there was no fiduciary relationship between them and any of the Defendants (including Baer). The trial court granted IBT and SCSD's motion for summary adjudication of the breach of fiduciary duty cause of action, but denied the motion as to Baer.

Phase 2 Trial

The case was then assigned to Judge C. Robert Jameson. By the time of the phase 2 trial, the operative complaint was the fifth amended complaint. The fifth amended complaint contained many of the same basic allegations as the prior pleadings, but contained no allegations concerning any agreement between Baer and Tedder concerning Baer's participation in Tedder's law firm or the agreement they would split the law firm profits. Those allegations were moved to Tedder's amended cross-complaint against Baer. The fifth amended complaint described Plaintiffs as "'Tedder's lenders,'" from whom Tedder arranged financing to acquire the Ranch and the Guild properties. The fifth amended complaint (as with prior iterations) contained no allegations Plaintiffs were clients of Tedder's law firm or that the source of the loans was money placed by Plaintiffs with Tedder's law firm for asset protection. The fifth amended complaint alleged Tedder had arranged for Plaintiffs' loans to Defendants to purchase the Ranch and the Guild. The fifth amended complaint alleged Tedder was acting on his own behalf and on behalf of Plaintiffs in making the loans and there was a "'community of interest'" between Tedder and the lenders (i.e., Plaintiffs). The fifth amended complaint also alleged Tedder was the person with standing to collect on the loans and "he was vested with all necessary right title and interests in the loan[s], and the right (coupled with the duty) to act to enforce [the] loan agreements and collect the debts which each loan represented[.]" The fifth amended complaint alleged Baer was refusing to repay Plaintiffs' loans, was misusing the properties for his own benefit, rather than to repay Plaintiffs' loans and to thereafter share the profits from the properties with Tedder. The fifth amended complaint alleged Baer was a trustee of Plaintiffs' (as lenders) interests in the loans and the properties and as such had breached his fiduciary duties toward Plaintiffs.

The fifth amended complaint contained the following causes of action alleged by all Plaintiffs against all Defendants: breach of contract to pay specific loans (second cause of action); fraud and misrepresentation (third cause of action); negligent misrepresentation (fourth cause of action); common counts (fifth cause of action); unjust enrichment (sixth cause of action); constructive trust (seventh cause of action); equitable lien (eighth cause of action); accounting (ninth cause of action); breach of fiduciary duty (tenth cause of action);[6] and conspiracy (eleventh cause of action).

A trial status conference took place in April 2004, and the resulting order, approved by both sides, explained the order in which the case would be tried. The first phase would cover "[b]ackground and history of [the] parties, and the formation of the [j]oint [v]enture between Tedder and Baer." The second phase would cover the claims of the Grammer Limited partnerships "except alter ego and punitive damages." Later

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6 Although Judge McDonald had previously granted IBT and SCSD's motion for summary adjudication of the breach of fiduciary duty cause of action, the fifth and sixth amended complaint realleged the cause of action as to all Defendants. However, Plaintiffs agree the cause of action as tried in phase 4 pertains only to Baer.

phases would consider the claims of the remaining plaintiffs, the issues relating to the relationship of Tedder and Baer and dissolving their joint venture, any remaining claims and cross-claims of the parties, and then the court would consider alter ego claims, punitive damages claims, and any remaining matters.

The phase 2 trial took place during the summer of 2004. In the phase 2 statement of decision, the trial court made the following findings. In 1990, Don Grammer entrusted $11 million of his and his family's money to Tedder's law firm "to develop an estate plan and to protect the Grammer family's assets." Grammer was not aware of the business relationship between Tedder and Baer. Tedder formed an array of limited partnerships, with funding that came from various Grammer family members. Of the Grammer partnerships remaining in this action, Banyan was capitalized with $1,990,000 from Don Grammer himself; Pear Tree with $845,299 from Don Grammer's son Greg Grammer; and $772,000 from Don Grammer's daughter Daralyn Grammer. The rest of the $11 million was put into the other limited partnerships that were no longer parties to the action. Tedder was general partner with complete authority to invest the Grammer Limited Partnerships' money and structure loans. The Grammer Limited Partnerships were to make monthly payments back to the Grammer family totaling $22,500 a month for living expenses. They made the payments, but by December 1991, the Grammer Limited Partnerships lacked "sufficient liquid funds," so from December 1991 through early 1996, Tedder caused his law firm to deposit funds into the Grammer Limited Partnerships accounts so the monthly $22,500 payments could be made.

Tedder set up a series of loans from the Grammer Limited Partnerships to IBT and SCSD. Five of the Grammer Limited Partnerships loans were evidenced by promissory notes signed by Baer on behalf of IBT (four promissory notes of $700,000, $150,000, $150,000, and $25,000) and SCSD (one promissory note for $70,000). Baer claimed his signature on the notes had been forged, but the court found it was authentic. The trial court determined the Grammer Limited Partnerships were entitled to judgment on the five promissory notes totaling approximately $1.1 million, with IBT getting credit for $239,218 in payments it had made directly to the Grammer Limited Partnerships.

Following the phase 2 trial, Judge Jameson granted a motion for judgment brought by Defendants ruling judgment should be entered against the Grammer Limited Partnerships in favor of Defendants on the fourth and fifth causes of action (fraud and negligent misrepresentation), and on two additional loan claims that were not alleged in the complaint. The court also ruled judgment should be entered in favor of Baer on the breach of contract cause of action as to all loans made.

After the phase 2 trial, Judge Jameson retired and the case was assigned to Judge Kim Dunning. The trial court granted Tedder and Grammer Limited Partnerships' motion to appoint a neutral receiver to take control of the assets of the Tedder/Baer joint venture, and we affirmed that order. (*Banyan Limited Partnership et al. v. Baer et al., supra,* G036089.) The case was eventually reassigned to Judge Thierry Colaw.

Phase 3 Trial

In December 2005, Plaintiffs (now all represented by attorney Hartmann) filed a sixth amended complaint (the sixth amended complaint) and Tedder (also represented by Hartmann) filed a fourth amended cross-complaint against Defendants. The sixth amended complaint contained allegations and causes of action virtually identical to the fifth amended complaint. As relevant here, the sixth amended complaint consistently referred to Plaintiffs as "'Tedder's lenders'" from whom he obtained the financing for real estate acquisition by the Tedder/Baer joint venture. Tedder's cross-complaint alleged Baer entered into a contract with Tedder's law firm "to work for, administer and manage [its] operations . . . for compensation, with the right (commencing in the 3rd year of Baer's employment by the law firm) to receive a sum equal to [one-half] the [law firm] net profits . . . and the obligation to pay [one-half] of the net obligations/losses [of the law firm]." The cross-complaint alleged the law firm was

Tedder's property alone. It alleged Baer had not lived up to his obligations *vis à vis* the law firm by diverting law firm profits and assets for his own use.

Answer and cross-complaint

Defendants' answer to the sixth amended complaint (and Tedder's fourth amended cross-complaint) raised numerous affirmative defenses including that all causes of action were barred "by the applicable statute of limitations, including but not limited to [Code of Civil Procedure sections] 336a, 337, 337a, 338, 339, 340, and 343." Defendants filed a cross-complaint against all Plaintiffs and Tedder, alleging Baer learned in May 1996 that despite the agreement with Tedder to split the law firm profits, Tedder had been diverting all the law firm profits for his own use, and Tedder refused to account for the funds.

The phase 3 trial took place in November and December of 2006 before Judge Colaw. Tedder and Plaintiffs were represented by attorney Hartmann. The issues to be tried in phase 3 were identified as those pertaining to the relationship between Tedder and Baer: the terms of the agreement between Tedder and Baer, whether Tedder breached the agreement by failing to provide consideration in the form of law firm profits or by embezzling the law firm profits, and whether the joint venture agreement violated legal restrictions on lay persons participating in a law firm.

In the phase 3 statement of decision entered May 31, 2007, the trial court found the Baer and Tedder partnership was to provide legal and investment advice and estate planning through the law firm, and the central goal of the partnership was to take the law firm profits and invest them in real estate. The court found there was a complete failure of consideration on Tedder's part. The accounting records showed no law firm profits, and a law firm loss of approximately $1.7 million over the years, and thus, there were no partnership profits to invest. Tedder agreed he never made any personal financial investment in any of the properties. Because there were no profits to invest, Tedder and Baer devised a "second model or ancillary [p]lan" to fund real estate acquisition through loans from law firm clients and use anticipated later profits or cash flow from the law firm to pay off the loans. But neither Tedder, nor the law firm repaid any of the loans—only Defendants either made payments on the loans, or they were still Defendants' obligation.

The trial court observed that both Tedder and Don Grammer had serious credibility issues—exacerbated by their agreement for the Grammer family to share in any recovery Tedder had against Baer. The court noted the evidence was that of the more than $11 million Grammer had turned over to accounts controlled by Tedder, $1.1 million could be attributed to loans made to IBT to purchase the Ranch; and the only evidence was the rest "*disappeared* in what was described . . . as 'bad investments.'" The trial court found Tedder had no interest in any of the real property owned by IBT or SCSD. Additionally, the court found the Tedder/Baer partnership in the law firm was illegal and thus Tedder could not prevail on any of his causes of action against Baer arising out of management of the law firm. The court found Tedder failed to prove Baer breached any fiduciary duty owed to him.

As for Defendants' cross-complaint, the trial court found Tedder breached the Tedder/Baer partnership agreement by failing to provide any law firm profits for investment. The court also found Baer had established his claims against Tedder for fraud, breach of fiduciary duty, and conversion, through extensive evidence demonstrating that Tedder made numerous false representations concerning his intentions with respect to their partnership, concealed facts about the source and the distribution of law firm income, and improperly secreted monies belonging to the law firm to his own personal use, the use of his family, and to offshore bank accounts, without Baer's knowledge or approval. However, due to the underlying illegality of the law firm partnership agreement, the court determined "it should leave the parties as they lie[,]" and it denied Baer any recovery against Tedder.

Post Phase 3 Summary Adjudication Motions

In December 2007, after the court ruled on phase 3 (but before the final statement of decision was signed), the Grammer Limited Partnerships moved for summary adjudication of the sixth amended complaint's breach of fiduciary cause of action. Similar motions were filed on behalf of the other Plaintiffs (the McGrath Limited Partnerships and Birch). They now claimed that because Tedder's partnership with Baer included being partners in Tedder's law firm, Baer owed the same fiduciary duty as Tedder with regard to Tedder's asset protection services and the management and investment of the Grammer Limited Partnerships' money. They claimed Tedder's making loans to entities in which he or Baer had a financial interest violated obligations imposed on a fiduciary by the Probate Code and violated the rules of Professional Conduct for attorneys which prohibit self-interested transactions with a client.

In January 2008, Baer also filed a motion for summary adjudication, seeking a ruling that he owed no fiduciary duty to the Grammer Limited Partnerships. He argued the theory he owed a fiduciary duty to the Grammer Limited Partnerships based on Tedder's management of the clients' funds through the controlled accounts, and was liable as Tedder's partner for Tedder's misuse of client funds through self-interested transactions, had not been pled in any of the complaints. Moreover, in the pre phase 2 summary adjudication motions, the Grammer Limited Partnerships had specifically conceded there was no fiduciary relationship between them and Baer. Baer asserted the new claim was time-barred under Code of Civil Procedure section 343 [four years for breach of fiduciary duty claim].

The trial court denied the Grammer Limited Partnerships' motion for summary adjudication of the breach of fiduciary cause of action, but granted it as to the issue of whether a fiduciary duty was owed. The court concluded Baer and the Baer/Tedder partnership had a fiduciary duty to not enter into transactions with the Grammer Limited Partnerships pursuant to which they held an interest adverse to the

Grammer Limited Partnerships and had a duty to comply with Rules of Professional Conduct, rule 3-300. The trial court denied Baer's motion for summary adjudication.

Phase 4 Trial

The phase 4 trial took place from August 17, 2010, to October 5, 2010, before Judge Colaw. Although all remaining causes of action in the sixth amended complaint and the cross-complaints (except as to Tedder who by now was in bankruptcy) were at issue in this final phase, the only cause of action on which any evidence was presented was Plaintiffs' cause of action for breach of fiduciary duty. In their trial brief filed August 13, 2010, Defendants asserted the breach of fiduciary duty cause of action against Baer was barred by the one-year statute of limitations contained in Code of Civil Procedure section 340.6, and none of that section's tolling provisions applied.

The Grammers

Don Grammer testified he hired Tedder to develop an asset protection plan for his family and in 1990 turned over control of millions of dollars to Tedder. At the time the asset protection plan was set up, Grammer had a $3 million judgment against him in litigation involving a former business partner named Perkins, and was involved in different litigation with a company called Heller Financial.

Greg Grammer testified (via his deposition) protecting the family's money from creditors was the goal of the asset protection services. Greg Grammer had made the initial contact with Tedder at a seminar and told Tedder "we were in deep trouble and need an asset protection lawyer to look at all of [our] stuff." The family understood they were completely giving up control over the funds to protect the funds from potential judgment creditors. Greg Grammer testified the intention was that once the lawsuits all settled, the family could begin dismantling the controlled account scheme and then would be left with basic estate plan and asset protection. Greg Grammer testified that from his perspective, the legal services Tedder provided "worked because it irritated Heller[,]" and "kept them at bay while we worked on other things." Tedder confirmed Don Grammer wanted the plan set up to protect his assets from potential judgment creditors in current lawsuits (Perkins and Heller), and he was also concerned about estate tax issues.

In August 1990, Tedder formed numerous Nevada limited partnerships of which a Tedder-owned corporation (Key Enterprises, Inc. or Kingsbury Financial, Inc.) was general partner with complete control over the partnership assets, and a Grammer-controlled limited partnership was the limited partner.[7] As general partner, the Tedder-controlled entity would own three to five percent of the limited partnership. Tedder then opened numerous bank accounts, domestic and foreign, in the names of the various Grammer Limited Partnerships into which the Grammers' funds would be deposited and over which Tedder had complete control. Funds were moved around by Tedder between various accounts and limited partnerships, often used for loans to Tedder's law firm or to Baer's entities (IBT and SCSD), but when payments were made back to the Grammers they were not necessarily credited to the account from which the money originally came. For example, there were occasions where Banyan loaned money to IBT, but when IBT made a repayment, the funds went directly to one of the Grammer-controlled limited partnerships.

Don Grammer specified he wanted $22,500 paid monthly from the Grammer Limited Partnerships to the corresponding Grammer-controlled limited partnership for family living expenses. The rest was supposed to be invested. Don Grammer testified he understood the funds would be invested "conservatively." Gary Case, a Certified Public Accountant who worked out of the Tedder law firm offices, was recommended by Tedder to be the accountant for the Grammer Limited Partnerships.

Don Grammer testified he turned over $11 million to Tedder to be placed in the various Grammer Limited Partnerships. About $1.9 million was returned via the

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[7] For example, Banyan had as its general partner Key Enterprises, and as its limited partner an entity called Apple Orchard Limited Partnership, which was controlled by Don Grammer.

monthly $22,500 payments. Don Grammer testified he had no idea what happened to the rest of the money. At the phase 3 trial, Grammer testified the rest of the money disappeared in "bad investments" by Tedder, but at phase 4 he testified it had been stolen by Tedder.

Don Grammer testified that he knew in 1991 or 1992 that Tedder was using Grammer Limited Partnerships' money to make loans to IBT, but he was not aware of Tedder's law firm partnership with Baer at the time. No conflict warnings were given. But Don Grammer knew the loans to IBT were not evidenced by promissory notes and they were unsecured.

In 1993, Greg Grammer moved into office space in Tedder's law firm to oversee the family's business. Unhappy with the quality of information they were receiving from Case, and with Case's high fees, the Grammers hired their own accountant, Kitty Wong. Greg Grammer testified he sometimes saw Baer at the law firm office. He knew Tedder and Baer were business partners, Tedder had a partnership interest in the Ranch, and Grammer money was being loaned by Tedder to IBT in connection with the Ranch.

Wong testified she provided Don Grammer with accounting records and tax returns that contained information on the loans being made. She described constant transfers of money between the various Grammer Limited Partnerships and the law firm. She testified the transfers were always at the direction of a member of the Grammer family or a law firm employee. She never spoke to Baer nor did he ever direct her as to transfers of money to or from the Grammer Limited Partnerships.

The McGraths

Tedder set up a similar asset protection plan for the family of Richard McGrath, a physician. McGrath agreed he wanted the plan to protect his assets from malpractice actions. Additionally, at the time McGrath retained Tedder, the Internal Revenue Service was pursuing him for about $1.7 million relating to another investment that had gone awry. Tedder set up 10 domestic (Nevada) limited partnerships and two offshore limited partnerships for McGrath. Tedder arranged for Case to be the accountant for the McGrath Limited Partnerships. McGrath testified that by 1990 he gave Tedder $3.8 million to place in the various limited partnerships, of which about $1.2 million was placed in the McGrath Limited Partnerships remaining in this action—Slevin, CTM, and Trails End. McGrath had destroyed most of his records concerning most of the limited partnerships. Although in earlier phases of the trial, McGrath testified he never received any funds back from Tedder, at the final phase McGrath testified he had received about $1 million back.

Tedder told McGrath his money would be invested in secured loans at 12 percent interest and McGrath would get regular reports on his assets. In 1991, McGrath knew Tedder was loaning his money to various entities and at no time did he get any documentation (e.g., contracts, promissory notes, or deeds of trust) for the loans. The same year, McGrath complained to Case he could not figure out from the reports he was receiving where his money was, but he never got an adequate response.

By 1992, McGrath knew Tedder was making loans to his entities (to the Legal Forum and to Tedder's law firm). He knew Tedder was using his own entities as conduits to move McGrath's money around and that by doing so he made it harder to trace by creditors. McGrath considered Tedder's activities to be part of the legal services he had retained him for.

Although McGrath testified he did not know Tedder and Baer were partners in Tedder's law firm, he knew they were partners in real estate investment. In 1992, McGrath knew loans were being made to Baer's company, IBT, to invest in the Ranch, and he knew loans were being made to Tedder's company, Van Dan, and to the Legal Forum. McGrath testified that although he at first got regular reports, by 1994 he was only getting quarterly reports on his accounts and he stopped getting any reports after 1996.

Sometime around 1995, McGrath complained to Tedder about the high accounting fees relating to all the limited partnerships, so Tedder proposed doing a "roll-up" of several limited partnerships into one new entity. Tedder recommended an attorney named Kenneth Reiserer to review the records and prepare the roll-up. McGrath wrote to Reiserer, providing him with documents he had, asking him to review the entire estate plan "'including all loans to Tedder, et al.'" McGrath acknowledged being told by Reiserer that Tedder's record keeping was atrocious. McGrath received a copy of a letter from Reiserer in April 1996, addressed to Tedder in which Reiserer told him of the herculean task before him because of the "'gross inaccuracies . . . in virtually every aspect of the . . . planning that was previously done.'" Reiserer complained about the total lack of documentation of any loans, including the loan transactions between the McGrath Limited Partnerships and entities associated with Tedder. McGrath conceded he ignored Reiserer because Tedder said he had documents and all the loans were "secured" even though Tedder could not produce any documents relating to the loans. McGrath testified he did not know the current lawsuit had been filed by Tedder on behalf of the McGrath Limited Partnerships until around 2003. Tedder remained general partner of McGrath's partnerships until 2008.

Schoenman

Schoenman passed away before trial and his testimony was received via his deposition. Around 1990, Schoenman gave Tedder $2 million to put in offshore investments, and testified it was basically his life savings. He denied having any creditors at the time, but he was concerned about the risk of lawsuits against him in the future.

Tedder formed 12 limited partnerships for Schoenman into which Schoenman's funds were placed. Tedder was supposed to invest the money and make payments back to Schoenman of $5,000 a month for the first six years, and $10,000 a month after that. Tedder discussed investing Schoenman's money in real estate with

Baer. Although Schoenman understood that as general partner, Tedder had absolute control over the investments, there was no discussion about money being loaned to Tedder or his law firm. Schoenman did not know Baer was Tedder's partner in the law firm.

By 1992 or 1993, Schoenman had become very concerned because there was no documentation for what was happening with his money, there were too many entities handling investments, and "the entities were crossing each other as far as one would become a limited partner in another." He knew "something was amiss." By 1994, when Tedder moved his operation to Florida, Schoenman was not receiving the agreed upon payments. He received no payments after 1994, except a couple small random payments in 2002 or 2003. He testified he received only about $100,000 back.

In 1994, Schoenman consulted with attorneys about suing Tedder and Baer, but Schoenman ultimately decided to not pursue legal action because he believed Tedder's and Baer's knowledge of international banking practices would make it too difficult to collect on any judgment. Schoenman testified Tedder never told him about filing this lawsuit against Defendants on behalf of Birch, and he first learned about it from his current counsel, Hartmann.

Tedder

Tedder testified he controlled Plaintiffs as general partner. Either he or Case were signatories on the various bank accounts. Tedder would recommend Case as accountant to his clients, and when clients wanted to know about their money, he would direct them to Case for information. Baer was never mentioned.

Tedder testified his partnership agreement with Baer was to pool their resources to invest in real estate. The controlled accounts were not part of Tedder and Baer's partnership. Baer played no role in setting up the controlled accounts, and had no control over them. Tedder never gave conflict of interest disclosures to Baer and never discussed with Baer what a lawyer's duties were to clients.

Tedder testified the estate plan/asset protection program he set up for Baer was not similar to the ones Tedder set up for the Grammers, the McGraths, or Schoenberg. Although the Baer plan involved setting up trusts and offshore accounts, at no time did it involve Baer placing his family assets in Tedder's control via limited partnerships. Tedder testified he believed the asset protection program he had set up for clients was legal. Additionally, he did not make disclosures concerning self-interested transactions (i.e., loans to entities in which he had an interest) because he believed the limited partnership agreements allowed him as general partner to deal with interested parties.

Tedder agreed he had told the various clients their funds would be invested only in secured transactions, but the loans were not secured. He testified that in 1994 and again in 1995 Don Grammer became extremely upset with him over the handling of his money and threatened to sue Tedder. Tedder went to Baer and told him he had to give Grammer security for the loans. Baer refused, and at that point, their partnership ended. Tedder considered the Baer/Tedder partnership over by the time Tedder filed the original complaint on May 24, 1996.

The Accountants

An accountant who worked for Case from 1991 through 1993, William Bender, testified Case's office was in the same building as the Tedder law firm. Case referred to Baer and Tedder as his partners, but Bender did not know in what. While Case was starting up his accounting business, payroll checks came from IBT for two or three months. Bender testified that in 1993, Tedder moved to Florida to manage the estate and assets of a different wealthy client. Up until that time, Case had weekly meetings with Baer and Tedder at Mimi's Café in Newport Beach to discuss "business." Case would ask Bender for a "schedule" of the controlled account loans before these meetings, but Bender was never present at the meetings and had no idea of what took place at them.

Case was a CPA who handled accounting for Tedder, Baer, and the law firm. He was also chief financial officer of IBT and for a few weeks designated president of IBT while Baer was out of the country. He had some sort of profit sharing arrangement with Baer and Tedder, alternately described by Case as an agreement to give them a discount on his accounting fees, or to share some portion of his accounting firm profits with them. At Tedder's recommendation, Case was typically hired as tax accountant for the Tedder controlled accounts, including Plaintiffs. Case could not recall disclosing his relationship with Tedder to the clients.

Case testified he, Tedder, and Baer had weekly meetings at which they would discuss the upcoming cash flow needs of the law firm and the joint venture real estate investments. Case testified Baer had no involvement in the Tedder controlled accounts; Tedder kept complete control over them. Case's accounting records pertaining to the controlled accounts were never brought to the Mimi's Café meetings.

Baer

According to Baer, Tedder and Baer's partnership began to sour for many reasons. In 1991 or 1992, Tedder told Baer and Case, Don Grammer was threatening to sue the law firm on the loans. Then Tedder told Baer he had reached an agreement with Don Grammer to stave off litigation by paying the Grammers $22,500 a month until all the loans were repaid. Baer and Tedder would have to forgo their monthly salary to make sure the law firm had sufficient funds to pay the Grammers. Baer believed the $22,500 a month payments were repayments of loans the Grammer Limited Partnerships made to IBT.

In 1993, Tedder told Baer he had sold the estate planning business to Charles Givens for $5 million. Baer never received any portion of the money. Baer began demanding that Tedder "come clean" on where the law firm revenues had gone, but he would not. Finally, in late 1995, Don Grammer called Baer and demanded Baer arrange for the law firm to pay the Grammer family more money. Because Baer believed the Grammer Limited Partnerships loans had been repaid, Baer sought the accounting records from Tedder and Case necessary to determine how much was still owed. Tedder could not, or would not, provide the information.

Baer and Tedder had a final meeting in March 1996. According to Tedder, he "insisted" Baer provide security for the debts owed to the Grammers and other clients, but Baer refused to do so until he received a full accounting of the monies Tedder had taken out of the law firm. Tedder considered that meeting to constitute the end of his partnership with Baer, and he filed this lawsuit two months later.

Phase 4 Ruling

In the statement of decision entered on February 24, 2011, the court observed Plaintiffs' principal contention in the phase 4 trial was that Baer was vicariously liable for Tedder's breaches of his fiduciary duties. They asserted Tedder's asset management services were part of the services offered by the Tedder/Baer law firm partnership. Moreover, they asserted Baer directly participated in the management of their assets; knew their assets were being improperly diverted by Tedder; and never intended to repay the monies loaned to IBT and SCSD. Baer contended Tedder's asset management services were outside the scope of the Tedder/Baer partnership and the claim for breach of fiduciary duty was barred by the applicable one-year statute of limitations of Code of Civil Procedure section 340.6.

The trial court concluded the breach of fiduciary duty cause of action was not pled within the one-year statute and there were no grounds for tolling. The court found Grammer and McGrath had hired Tedder to conceal their assets from creditors and taxing authorities. They knew Tedder fashioned a labyrinth of limited partnerships for the purpose of moving their assets to various locations to avoid attack by creditors. Grammer and McGrath had significant credibility problems.

The court found Grammer, McGrath, and Schoenberg all knew before May 1995 that Tedder was "probably cheating them." The court found the breach of fiduciary duty cause of action in the operative sixth amended complaint did not relate back to the original complaint filed in May 1996. The original complaint never alleged any ultimate facts that apprised Baer he was going to be sued on a theory that, as Tedder's partner, he was vicariously liable for Tedder's breaches of professional duties in mishandling his law firm client's funds. The only ultimate facts alleged against Baer was that through his entities IBT and SCSD he was liable to repay loans made to his entities.

The court also concluded Baer was not involved in management of the controlled accounts. The evidence on this point, the testimony of Tedder, Case, Berens, and Wong, was uniform that Baer played no role in the controlled accounts. The court went on to observe it was Tedder who filed the May 1996 complaint against Baer—the "mastermind of [the] controlled accounts scheme . . . was on the same side of this lawsuit as [Plaintiffs]." There was no credible evidence Baer received compensation or division of profits from Tedder's asset protection services; the only evidence was that IBT and SCSD accepted "'loans'" from Tedder's clients. The original complaint (and all subsequent complaints) alleged Plaintiffs were lenders and Baer's entities were borrowers responsible for repaying loans.

Finally, the court found, "This case appeared to be a collusive lawsuit between Tedder and [P]laintiffs to get money from Baer that Tedder himself had bilked from [P]laintiffs, without participation by Baer. Some of the money did indeed go to IBT and SCSD as loans, among numerous others who received money from the Tedder-controlled accounts. Baer is already obligated to pay those loans back though his entities as determined by Judge Jameson in [phase 2]. In this case nearly everyone changed his story at some point. [P]laintiffs had the burden of proof and were heavily handicapped by their association and reliance on Tedder, his actions, his destruction of records, and his testimony as well as by their own credibility problems. All of the [P]laintiffs either hid records or destroyed them, some on purpose, some over the lengthy course of this trial through poor record keeping. The effect of all of this on the trier of fact was a failure of proof as to [P]laintiffs' case . . . ."

The court's statement of decision also included a finding Plaintiffs had affirmatively abandoned any claims that Baer was an alter ego of his corporations, IBT and SCSD, because they presented no evidence on this claim.

Judgment; Postjudgment Motions

After the phase 4 statement of decision was entered, the Grammer Limited Partnerships filed a motion for new trial asking the court to strike the finding in its statement of decision that Plaintiffs had abandoned their alter ego claim. They later filed a second motion for new trial on the grounds Baer's statute of limitation defense had been waived because he did not specifically plead Code of Civil Procedure section 340.6 in his answer.

The trial court entered final judgment on May 31, 2011, on all causes of action in the complaint (except those involving Tedder and his wife, as those had been severed due to Tedder's bankruptcy).[8] The court entered judgment for each of the Grammer Limited Partnerships against IBT on the breach of contract and common counts causes of action in accordance with Judge Jameson's phase 2 August 30, 2005, statement of decision as follows: Banyan was awarded $700,000; Orange Blossom was awarded $175,000; and Pear Tree was awarded $150,000. Pear Tree was also awarded $70,000 against SCSD. With pre and postjudgment interest, the judgment in favor of the Grammer Limited Partnerships now exceeds $3.5 million. The court entered judgment in Defendants' favor on all remaining causes of action as to the Grammer Limited Partnerships and on all causes of action as to the McGrath Limited Partnerships and Birch. Plaintiffs filed a notice of appeal from the May 31 judgment (the appeal before us). Defendants filed a cross-appeal from the judgment but later dismissed it.

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8 A corrected final judgment nunc pro tunc was entered November 15, 2011.

The court subsequently denied the Grammer Limited Partnerships' new trial motion as to their request to strike Baer's statute of limitations defense, but granted the motion as to their request to strike from the statement of decision the finding they affirmatively abandoned their alter ego claim and granted them a new trial as to the alter ego issue only. Baer separately appeals from the order granting new trial on the alter ego claim (*Banyan 2, supra,* G045797).

The Grammer Limited Partnerships and Baer and SCSD, filed a motions for attorney fees under Nevada Law, which governed the promissory notes on which the Grammer Limited Partnerships recovered. The trial court denied both motions and the Grammer Limited Partnerships, Baer, and SCSD appeal from the order (*Banyan 3, supra,* G046428).

DISCUSSION

A. Statute of Limitations

1. Code of Civil Procedure section 340.6 applies to the breach of fiduciary duty claim.

Plaintiffs contend the trial court applied the wrong statute of limitations to the breach of fiduciary duty claim against Baer. They argue Code of Civil Procedure section 340.6, the one-year statue applicable to an action against an attorney arising out of performance of professional services, does not apply because Baer is not an attorney and the breach of fiduciary duty cause of action was not premised upon the provision of legal services. Instead, Plaintiffs contend the only applicable limitations period is the catch-all four-year provision found in Code of Civil Procedure section 343 and under that provision the breach of fiduciary claim is timely. We disagree.

"Whether a [particular] statute of limitations applies ordinarily is a question of law. [Citation.]" (*Embarcadero Mun. Improvement Dist. v. County of Santa Barbara* (2001) 88 Cal.App.4th 781, 789.) Code of Civil Procedure section 340.6, subdivision (a), provides, "An action against an attorney for a wrongful act or omission, other than for actual fraud, arising in the performance of professional services shall be commenced within one year after the plaintiff discovers, or through the use of reasonable diligence should have discovered, the facts constituting the wrongful act or omission, or four years from the date of the wrongful act or omission, whichever occurs first."

Plaintiffs' breach of fiduciary duty cause of action against Baer that was presented at the phase 4 trial was premised upon the theory attorney Tedder violated his obligations of loyalty to his clients by engaging in self-interested transactions—making loans of client funds to entities in which he (and Baer) had a financial interest. Plaintiffs asserted the making of these self-interested loans without client consent violated both the California Rules of Professional Conduct, rule 3-300 [avoiding acquiring interest adverse to client without disclosure and written consent], and Probate Code section 16004 [trustee may not take part in transaction in which he has interest adverse to beneficiary].

Stoll v. Superior Court (1992) 9 Cal.App.4th 1362 (*Stoll*), is instructive. In that case, an attorney was retained by a corporation to help it locate and purchase a ski resort. The attorney did not disclose to the corporate client that he had already entered into a finder's fee agreement with the owner of a ski resort for the sale of the resort. After the sale was complete, the attorney obtained his finder's fee as a result of litigation against the former owner. The corporation then sued the attorney alleging he breached his fiduciary duties by acquiring a pecuniary interest adverse to a client without written consent, having an undisclosed relationship with another party interested in the subject matter of his client's representation, failing to disclose the conflicting interests in writing, and charging an "'unconscionable fee'" to the corporation while at the same time expecting a lucrative finder's fee from the adverse party to his client. (*Id.* at pp. 1365-1366.) The appellate court concluded "although styled as a breach of fiduciary duty, the misconduct alleged . . . is nothing more than professional malpractice subject to the one-year statute." (*Id.* at p. 1366.) Because the action was filed more than one-year after the corporate client learned of the finder's fee agreement, it was time barred.

In *Quintilliani v. Mannerino* (1998) 62 Cal.App.4th 54 (*Quintilliani*), an attorney agreed to provide both legal and non-legal administrative consulting services under an independent contractor agreement. (*Id.* at p. 63.) The court held plaintiffs' claim for negligence as to the non-legal administrative services was not subject to Code of Civil Procedure section 340.6, but the claims for breach of contract, breach of fiduciary duties, and negligent misrepresentation were, because the contract for legal and non-legal services was "inextricably intertwine[d]" and fiduciary obligations "arose solely from the[ ] attorney-client relationship[ ]." (*Id.* at pp. 67-69.)

Plaintiffs argue *Stoll*, *supra*, 9 Cal.App.4th 1362, is inapplicable. Pointing out *Stoll's* discussion of the Legislature's rationale behind providing a shorter statute of limitations for actions involving acts and omissions arising out of the practice of law—to counteract "the potential of lengthy periods of potential liability" and "thereby reduce the costs of malpractice insurance" (*id.* at p. 1368), Plaintiffs argue because Baer is not a lawyer, the concern is not present.

We do not think Code of Civil Procedure section 340.6 can apply so narrowly, particularly under the circumstances of this case. "'[T]he gravamen of a complaint and the nature of the right sued on, rather than the form of the action or relief demanded, determines which statute of limitation applies.' [Citation.]" (*Quintilliani, supra*, 62 Cal.App.4th at p. 66.) Plaintiffs' breach of fiduciary duty claim is premised on the claim attorney Tedder, as part of the asset protection services he was providing, was improperly loaning his law firm clients' funds to entities in which he had a financial interest. And as Tedder's partner in the law firm, non-lawyer Baer was liable for Tedder's breaches of his fiduciary duties. Although Baer is not an attorney, the fiduciary obligations Plaintiffs assert arose from the attorney-client relationship between Tedder and Plaintiffs. (*Quintilliani, supra*, 62 Cal.App.4th at p. 67.) Indeed, Plaintiffs specifically argue they asserted this new breach of fiduciary duty claim via their summary adjudication motion after Baer was found to be Tedder's partner in fact in the law firm hoping to impose upon Baer the same fiduciary responsibilities owed by their attorney, Tedder.

Plaintiffs also argue Code of Civil Procedure section 340.6 only applies to actions arising out of the performance of legal services. They argue Tedder was performing both legal and non-legal services for the clients. The legal services involved the creation of the clients' asset protection plans—i.e., forming the labyrinth of limited partnerships, including Plaintiffs, to which control of the clients' funds were ceded. But they argue the subsequent management and investment of those funds did not constitute legal services, but were financial or investment services. We disagree.

The clients each retained Tedder to perform legal services to develop complicated schemes to protect their assets and make them harder for potential creditors to reach. Tedder created asset protection plans, which consisted of forming limited partnerships to which the clients would cede control of their money granting control to general partner Tedder. It was the placement and movement of the funds by Tedder that effectuated the asset protection plan. Tedder was not only to invest the money but to ensure the investments were properly documented and secured, implicating the further provision of legal services by Tedder. Under the circumstances, the trial court reasonably concluded the asset management services were "inextricably intertwine[d]" with the legal services (i.e., estate planning and asset protection) Tedder was providing (*Quintilliani, supra*, 62 Cal.App.4th at p. 67), and thus the breach of fiduciary duty claim is subject to the one-year statute of limitations.

2. Plaintiffs had notice Tedder was making self-interested loans more than one year before the breach of fiduciary duty claim was asserted against Baer.

Plaintiffs offer a number of reasons as to why the breach of fiduciary duty claim was timely asserted against Baer. Before addressing those specific arguments, we must be mindful of who Plaintiffs are, when they had notice of the loans, and when their self-interested loans breach of fiduciary duty claim was first raised.

Plaintiffs are the *limited partnerships* who sued to recover on specific loans Tedder caused to be made—*not* the individual clients (i.e., Messrs. Grammer, McGrath, and Schoenman) who hired Tedder to form the limited partnerships on their behalf and who now through the few limited partnerships remaining in the action are seeking to recover the funds they placed with Tedder for asset protection. Every complaint filed in this case has consistently alleged a unity in the interests of Plaintiffs and Tedder placing them on the *same side* of the dispute—Tedder suing on behalf of the limited partnerships of which he was general partner. Every complaint has been premised upon allegations of a joint venture between Baer and Tedder to invest in real estate with financing to be obtained by Tedder, specific loans Tedder caused to be made by Plaintiffs (consistently described as the lenders) to Baer and his corporations to finance the Tedder/Baer joint venture real estate acquisition, and Baer and his corporations' failure to repay those loans (or to manage income and profits from the real estate for Tedder's benefit as Baer's partner and for Plaintiffs' benefit as lenders). No complaint has ever alleged the loans were improper in the first place because Plaintiffs were clients of Tedder's, or that Tedder breached any fiduciary duty to Plaintiffs by arranging the loans. It was on those factual allegations that Plaintiffs' complaints (beginning with the first amended complaint filed in 1999) alleged Defendants (i.e., Baer *and* the two corporations) owed Plaintiffs a fiduciary duty. In the first round of summary adjudication motions—the pre-phase 2 trial motion before Judge McDonald—the trial court found in IBT and SCSD's favor, granting summary adjudication of the breach of fiduciary duty cause of action as to them. And in those motions the Grammer Limited Partnerships specifically conceded there was no fiduciary relationship between them and Baer.

In was not until *after* the trial court ruled in phase 3 that although Baer was Tedder's partner in fact in the law firm (because of the agreement to split the law firm profits and Baer's administrative involvement with the law firm), Tedder could not recover anything from Baer and had no enforceable interest in any of the real estate, that the Plaintiffs' newly formulated fiduciary duty claim surfaced. In their December 2007 motion for summary adjudication of the breach of fiduciary duty cause of action, the Grammer Limited Partnerships asserted for the first time the partnership between Tedder and Baer in the law firm imposed a fiduciary duty on Baer with regard to Tedder's law firm clients. The Grammer Limited Partnerships asserted for the first time that making loans to entities in which Tedder had a financial interest violated obligations imposed on a fiduciary by the Probate Code and violated the rules of professional conduct for attorneys that prohibit self-interested transactions with a client.

Plaintiffs suggest the pleadings' placing them on the same side of the lawsuit as Tedder was the result of Tedder's control of the litigation (as both general partner of Plaintiffs and as the attorney who filed the original complaint). But the first amended complaint was filed in 1999 by attorney Moshenko, not by Tedder. By then the Grammers had already ousted Tedder as general partner of the Grammer Limited Partnerships, and filed suit against Tedder and Baer in Texas. Moreover, the operative complaint, the sixth amended complaint, was filed in December 2005, long *after* the Grammer family settled their Texas action against Tedder, by the same attorney who represented the Grammers in the Texas action and who thereafter undertook representing all Plaintiffs *and* Tedder in this action. Notably, the sixth amended complaint omitted allegations concerning any agreement between Baer and Tedder concerning Baer's participation in Tedder's law firm or the agreement they would split the law firm profits. The sixth amended complaint continued to specifically describe Plaintiffs as "'Tedder's lenders,'" from whom Tedder obtained the financing to acquire the various pieces of real estate. It alleged Tedder arranged for Plaintiffs' loans to Baer, IBC, and SCSD for purchase of the real property to be owned by the Tedder/Baer joint venture. The sixth amended complaint specifically alleged Tedder was acting on behalf of Plaintiffs in making the loans, and Tedder was "vested with all necessary right title and interests in the loan[s], and the right (coupled with the duty) to act to enforce [the] loan agreements and collect the debts which each loan represented[.]"

"It is well settled that the one-year limitations period of [Code of Civil Procedure] section 340.6 '"is triggered by the client's discovery of 'the facts constituting the wrongful act or omission,' not by his discovery that such facts constitute professional negligence, i.e., by discovery that a particular legal theory is applicable based on the known facts. 'It is irrelevant that the plaintiff is ignorant of his legal remedy or the legal theories underlying his cause of action.'" [Citation.]' [Citations.]" (*Peregrine Funding, Inc. v. Sheppard Mullin Richter & Hampton LLP* (2005) 133 Cal.App.4th 658, 685.)

"Resolution of the statute of limitations issue is normally a question of fact." (*Fox v. Ethicon Endo–Surgery, Inc.* (2005) 35 Cal.4th 797, 810.) The record supports the trial court's finding Plaintiffs (via the individuals who funded them) had notice of the nature of the loans more than a year before the original complaint was filed on May 24, 1996, and certainly more a year before they first alleged a breach of fiduciary duty cause of action in their first amended complaint filed in March 1999.

Don Grammer testified he knew in 1991 or 1992 the Grammer Limited Partnerships funds were being loaned to IBT, and knew the loans were not secured or evidenced by promissory notes, despite Tedder's assurances all loans would be documented and secured. Greg Grammer testified he knew Tedder had an interest in the Ranch and the Grammer Limited Partnerships were making loans to IBT in connection with the Ranch. In 1993, Greg Grammer was sent to work out of Tedder's office to supervise the family's investments, and hired Wong to be the new accountant for the Grammer family's controlled accounts. Wong provided Don Grammer with accounting records and tax returns that contained information on the loans being made. Wong testified money was often moved between the law firm and the Grammer Limited Partnerships and those transfers were often at the direction of a member of the Grammer family. By 1994, Don Grammer was very upset with Tedder over his lax handling of the controlled accounts and was threatening to sue Tedder. In 1995, Don Grammer called Baer and demanded he arrange for the law firm to pay the Grammer family more money. By 1996, the Grammer family had removed Tedder as general partner of the Grammer Limited Partnerships.

Richard McGrath, who funded the McGrath Limited Partnerships, testified he knew by 1992 that Tedder was making loans of McGrath Limited Partnerships funds to Tedder's own entities including the law firm, and Tedder was using his entities as conduits to move McGrath's money around. In 1992, McGrath knew Tedder and Baer were partners in real estate investment, loans were being made by the McGrath Limited Partnerships to IBT to invest in the Ranch, and loans were being made to Tedder's own company, Van Dan, and to the Legal Forum. McGrath agreed he had stopped getting any reports about the status of his controlled accounts by 1996.

In 1995, McGrath asked attorney Reiserer to review the estate plan Tedder had put together and to review "'all loans to Tedder, et al.'" Reiserer told McGrath that Tedder's record keeping was atrocious, and McGrath received a letter from Reiserer in April 1996, advising him there were "'gross inaccuracies . . . in virtually every aspect of the . . . planning that was previously done.'" Reiserer specifically warned McGrath about the total lack of documentation of any loans, including of the loan transactions between the McGrath Limited Partnerships and entities associated with Tedder.

Schoenman testified that although Tedder assured him he would receive regular reports about the status of his funds, he never received any reports. By 1994, Schoenman knew "something was amiss" and consulted with an attorney about suing Tedder but decided not to pursue him.

In sum, substantial evidence supports the trial court's conclusion Plaintiffs had notice through the individuals who owned them before May 1995, more than a year before the original complaint was filed May 24, 1996, that Tedder was using Plaintiffs' funds to make loans to entities in which he had a financial interest or was otherwise misusing the client funds entrusted to him. Accordingly, we turn to Plaintiffs' specific arguments as to why the statute of limitations nonetheless does not bar their breach of fiduciary duty cause of action against Baer.

3. Baer did not waive Code of Civil Procedure section 340.6.

Plaintiffs contend Baer waived Code of Civil Procedure section 340.6 because Defendants did not specifically plead that section in their answer. The trial court denied Plaintiffs' new trial motion brought on this ground. Although Baer does not respond to this specific contention on appeal (he did oppose the new trial motion), we reject it nonetheless.

Generally "[t]here are two ways to properly plead a statute of limitations: (1) allege facts showing that the action is barred, and indicating that the lateness of the action is being urged as a defense and (2) plead the specific section and subdivision. [Citation.]" (*Martin v. Van Bergen* (2012) 209 Cal.App.4th 84, 91.) Defendants' answer to the sixth amended complaint raised numerous affirmative defenses including that all causes of action were barred "by the applicable statute of limitations, including but not limited to [Code of Civil Procedure sections] 336a, 337, 337a, 338, 339, 340, and 343[,]" but the answer did not specifically reference Code of Civil Procedure section 340.6. Plaintiffs argue this is fatal to the trial court's reliance upon the defense.

This case presents a unique circumstance. As already discussed above, Plaintiffs' complaints, including the sixth amended complaint, did not allege the breach of fiduciary duty claim that went to trial in phase 4. The complaints, including the sixth amended complaint, alleged a breach of fiduciary duty premised on allegations Plaintiffs were lenders who made loans to Baer's corporations and all the Defendants breached a fiduciary duty with regards to repayment of the loans. Before the phase 2 trial, the trial court granted IBT and SCSD's motion for summary adjudication of the breach of fiduciary duty cause of action, although it did not grant Baer's summary adjudication motion (despite the Grammer Limited Partnerships' concession he was not a fiduciary).

(See *Price v. Wells Fargo Bank* (1989) 213 Cal.App.3d 465, 476 ["'[a] debt is not a trust and there is not a fiduciary relation between debtor and creditor as such'"], overruled on other grounds in *Riverisland Cold Storage, Inc. v. Fresno–Madera Production Credit Assn.* (2013) 55 Cal.4th 1169, 1176–1182) New pleadings were filed (Plaintiffs' fifth and then sixth amended complaints) and the parties stipulated Defendants' answer filed to earlier iterations of the complaint (which did not specifically plead Code of Civil Procedure section 340.6), would apply to the sixth amended complaint.

Defendants cannot be faulted for not raising in their answer an affirmative defense that was not, at the time it was filed, suggested by the cause of action as it was alleged. It was not until the Grammer Limited Partnerships' post phase 3 summary adjudication motion that the claim making the loans violated fiduciary duties owed by the Tedder law firm surfaced. Defendants' trial brief filed before trial began fully analyzed the applicability of Code of Civil Procedure section 340.6 to the theory on which Plaintiffs were now proceeding, and the defense was litigated at trial. Defendants' closing trial brief again fully analyzed the defense.

Plaintiffs state in their opening brief they "vigorously objected at every opportunity and requested that Baer be precluded from reliance on [Code of Civil Procedure [s]ection 340.6." But they do not cite to any objections made *during* trial when the defense was being litigated, rather they cite to their objections to the statement of decision and their new trial motion. Under the circumstances presented in this case, the defense was not waived. (See *Hydro-Mill Co., Inc. v. Hayward, Tilton & Rolapp Ins. Associates, Inc.* (2004) 115 Cal.App.4th 1145, 1165 ["'Under these circumstances, we are satisfied that the attempt to plead [the correct subdivision] should not be treated as a nullity, and that the objection to the manner of pleading it was waived by the failure of plaintiffs to urge such objection in the trial court.'"])

4. Tedder's continued representation of Plaintiffs did not toll the statute of limitations.

Plaintiffs contend the statute of limitations as to Baer was tolled by Tedder's continued representation of Plaintiffs, even after they became aware of Tedder's actions, and Tedder's continued domination and control of the limited partnerships. Not so.

Code of Civil Procedure section 340.6, subdivision (a)(2), tolls the statute of limitations on a claim so long as "[t]he attorney continues to represent the plaintiff regarding the specific subject matter in which the alleged wrongful act or omission occurred." But in *Beal Bank, SSB v. Arter & Hadden, LLP* (2007) 42 Cal.4th 503, 508 (*Beal Bank*), our Supreme Court ruled the tolling applies only as to the attorney who continues to represent the client, not to the attorney's former firm and partners when the attorney leaves the firm taking the client with him.

In *Beal Bank*, *supra*, 42 Cal.4th 503, the attorney's alleged malpractice occurred, and plaintiffs had notice of their injury, while the attorney was employed at the defendant law firm. The attorney left the law firm, taking the plaintiff client with him. The plaintiffs sued the law firm after the one-year statute of limitations ran. The Supreme Court held the tolling of the statute as to the attorney because of his continued representation of the plaintiff, did not operate to toll the statute as to the attorney's former law firm and its partners. "When a lawyer leaves a firm and takes a client with him, the firm's representation of the client ceases. There is no risk the firm will attempt to run out the clock on the statute of limitations by offering reassurances and blandishments about the state of the case. Conversely, the firm loses all ability to mitigate any damage to the client. [Citation.]" (*Id.* at pp. 511-512.) Here, Plaintiffs seek to hold Baer liable for Tedder making self-interested loans by virtue of his partnership in Tedder's law firm. The uncontroverted evidence is the Tedder/Baer partnership ended in March 1996 shortly before Tedder filed this action against Baer and his corporations on behalf of Plaintiffs to recover on loans. Tedder's continued representation of Plaintiffs after the partnership ended did not toll the statute of limitations as to Baer.

Plaintiffs contend *Beal Bank*, *supra*, 42 Cal.4th 503, is distinguishable because the plaintiff in that case knew their attorney had terminated his affiliation with the defendant law firm. But they had no knowledge Baer was Tedder's partner in the law firm, no knowledge the relationship had ended, and Tedder's domination and control of Plaintiffs prevented them from gaining such knowledge. Again, Plaintiffs' arguments ignore who Plaintiffs *are* and who they *are not*. Plaintiffs are the limited partnerships—not the individuals who funded the limited partnerships (i.e., Messrs. Grammar, McGrath, and Schoenman). Tedder (through his Tedder-owned entities) was Plaintiffs' general partner, controlled and managed them, and his knowledge would generally be imputed to the other partners and the limited partnerships. (Corp. Code, § 16301, subd. (1) [agent of partnership]; see also *GHK Associates v. Mayer Group, Inc.* (1990) 224 Cal.App.3d 856, 881 [knowledge of general partner imputed to partnership].)

Even if Tedder's continued representation of the limited partnerships tolled the statute of limitations as to Tedder, it was not tolled as to Baer once the partnership ended in March 1996. Plaintiffs' reliance on the relation-back doctrine does not aid them. There was no breach of fiduciary duty cause of action alleged in the original complaint filed in April 1996. "An amended complaint relates back to a timely filed original complaint, and thus avoids the bar of the statute of limitations, only if it rests on the same general set of facts and refers to the same 'offending instrumentalities,' accident and injuries as the original complaint. [Citations.]" (*Davaloo v. State Farm Ins. Co.* (2005) 135 Cal.App.4th 409, 415.) There were no allegations in the original complaint that encompassed Plaintiffs' claim making the loans was improper and constituted a breach of fiduciary duty. Neither the original complaint (nor any other complaint filed in this action), contained allegations of any wrongdoing by Tedder. As the trial court noted in its statement of decision, none of the complaints alleged ultimate facts that apprised

Baer he was vicariously liable for Tedder's breaches of his professional duties. The ultimate facts alleged in the original complaint were that Baer and his corporations were liable to repay the specific loans to IBC and SCSD detailed in the complaint.

5. Repudiation of trust relationship by Baer was not required.

Plaintiffs also contend that the statute of limitations on their cause of action against Baer did not begin to run until Tedder unequivocally repudiated his trust relationship with regard to Plaintiffs. They argue Tedder and his law firm were trustees of the assets Plaintiffs put in Tedder's control. Moreover, they assert Grammer, McGrath, and Schoenman's notice of facts that might have put a reasonable person on notice Tedder was misusing client funds by making self-interested loans did not trigger the statute of limitations because in a trust relationship, the "statute [of limitations] does not begin to run absent a clear repudiation of the trust by the trustee, or a known breach of the trustee's duty . . . ." (*Di Grazia v. Anderlini* (1994) 22 Cal.App.4th 1337, 1349.) Plaintiffs argue that would not have occurred until they demanded return of their money and Tedder refused—here Tedder continued to make some payments to Plaintiffs after filing the original complaint. But Plaintiffs did know Tedder had breached his fiduciary duties. They were all aware more than one-year before the original complaint was filed that Tedder was not providing accountings of their funds and was making self-interested loans. Grammer was threatening to sue Tedder because of his mishandling of the Grammer Limited Partnerships; Schoenman testified he went so far as to hire an attorney in 1994 to sue Tedder, but decided not to; McGrath testified he knew in 1992 that Tedder and Baer were partners in real estate and Tedder was using McGrath's money to make loans to finance those investments.

Moreover, Plaintiffs' argument ignores the trial court found Baer played no role in the controlled account scheme. The uncontroverted evidence was that although Baer and Tedder had agreed to form a joint venture to mass market estate plans similar to the one Tedder had created for Baer, the plan created for Baer was nothing like the ones created for Grammer, McGrath, and Schoenman. There were no limited partnerships formed and no ceding control of assets to Tedder to put them beyond creditors' reach. Tedder, Case, and Wong all testified Baer had no involvement with the controlled accounts. He did not manage them or direct the movement of funds within them.

6. Concealment of Baer's partnership status did not toll the statute of limitations.

Plaintiffs contend the statute of limitations on their breach of fiduciary duty cause of action against Baer was tolled because Baer "fraudulently concealed" his partnership status in Tedder's law firm. They argue Baer and Tedder both "relentlessly" lied throughout these proceedings about Baer's "true status" as Tedder's law partner. We reject the argument.

Plaintiffs point out that in his cross-complaint, Baer described his relationship with Tedder's law firm as being that of an administrator providing services of a non-lawyer. Tedder's first amended complaint did not describe Baer as his "law partner" but rather as the administrator and manager of the law firm with the right to receive one-half of the law firm profits and the obligation to pay one-half the law firm's expenses. In the Texas action filed by the Grammers, Baer denied being an owner of Tedder's law firm and the Texas appeals court described Baer as an office administrator, not as his "law partner." Following a 1997 State Bar proceeding against Tedder, the State Bar described Baer not as Tedder's "law partner" but as a "marketing consultant" to Tedder's law firm. And in the 1999 Givens bankruptcy proceeding, Baer denied his joint venture with Tedder involved asset protection planning.

But Plaintiffs argue that in the phase 3 trial in this proceeding, which occurred in 2006, Baer for the first time testified he regarded himself as a partner equal to Tedder in the law firm. Plaintiffs argue it was not until this startling revelation that non-attorney Baer was Tedder's partner in the law firm that they became aware of their claim Baer was liable for Tedder's breaches of his attorney-fiduciary duties owed them. And "where the facts are such that even discovery cannot pierce a defendant's intentional efforts to conceal his identity, the plaintiff should not be penalized." (*Bernson v. Browning-Ferris Industries* (1994) 7 Cal.4th 926, 937.)

There was no fraudulent concealment of Baer's identity so as to toll the statute of limitations. Baer's identity has always been known to Plaintiffs. We start with the fact the original complaint was filed by Tedder as general partner of Plaintiffs, who was certainly aware of his business arrangement with Baer. Greg Grammer and McGrath both knew of Baer's real estate partnership with Tedder before the original complaint was filed, and Don Grammer called Baer directly in 1995, and demanded he arrange for the law firm to pay the Grammer family more money. Plaintiffs cannot claim they were unaware of Baer's one-half profit sharing interest in the Tedder law firm until the phase 3 trial in 2006. It was an allegation in the first amended complaint filed in 1999. Additionally, Baer testified in 2000 in the Grammers' Texas lawsuit that he and Tedder were "sharing profits" and the monthly $22,500 payments to the Grammers "were made from our profits." It was this profit sharing arrangement that led the trial court in phase 3 to conclude Baer was Tedder's "partner in fact" in the law firm, but because that arrangement was illegal, neither could recover damages from the other. Plaintiffs' assertion the Baer and Tedder law firm partnership was concealed from them until 2006, and could not have been revealed by their discovery in the case, is without merit.

In conclusion, the trial court correctly determined the breach of fiduciary duty cause of action against Baer is time-barred. For that reason, we need not address Plaintiffs' remaining contentions pertaining to the trial court's alternate basis for ruling against them—they failed to prove their breach of fiduciary duty claim.[9]

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[9] Plaintiffs also briefly argue there is "no substance" to Baer's affirmative defense of unclean hands. They argue that because their conduct in attempting to protect assets from creditors was not directed at Baer, he has no standing to assert such a defense. (See *Pepper v. Superior Court* (1977) 76 Cal.App.3d 252, 259 [improper conduct must be directed at person raising claim].) There is no mention of the affirmative defense in the trial court's statement of decision, and therefore, we need not consider the point further.

B. Other Findings

Plaintiffs argue there is no factual basis for the finding in the phase 4 statement of decision that, "This case appeared to be a collusive lawsuit between Tedder and . . . [P]laintiffs to get money from Baer that Tedder himself had bilked from . . . [P]laintiffs, without participation by Baer." They also argue there are no grounds for the court finding them somehow responsible for Tedder's destruction of records. That finding (which was part of the collusive lawsuit finding) was that in meeting their burden of proof on breach of fiduciary duty Plaintiffs "were heavily handicapped by their association and reliance on Tedder, his actions, his destruction of records, and his testimony as well as by their own credibility problems. All of the [P]laintiffs either hid records or destroyed them, some on purpose, some over the lengthy course of this trial through poor record keeping." Both arguments are devoid of any reasoned legal analysis or citation to authorities. Accordingly, we consider the point waived. (See *Badie v. Bank of America* (1998) 67 Cal.App.4th 779, 784-785 (*Badie*) [when appellant raises issue "but fails to support it with reasoned argument and citations to authority, we treat the point as waived"]; see also *Kim v. Sumitomo Bank* (1993) 17 Cal.App.4th 974, 979 (*Kim*) [same].)

C. The Alter Ego Finding

Plaintiffs contend the trial court's finding contained in its phase 4 statement of decision they "affirmatively abandoned" any claim Baer is an alter ego of his corporations because they failed to litigate it in the phase 4 trial is unsupported by substantial evidence. (As this argument pertains only to the Grammer Limited Partnerships we will hereafter refer to them as such, rather than as Plaintiffs.) Baer offers no response to the argument in this appeal, but he separately appeals from the trial court's postjudgment order granting the Grammer Limited Partnerships' motion for new trial on the limited issue of alter ego and striking the abandonment finding from the phase 4 statement of decision. (*Banyan 2, supra*, G045797.) The Grammer Limited Partnerships state they raise the issue in *this* appeal as a protective matter, in the event we reverse the new trial order in *Banyan 2*. However, their argument in *this* appeal consists only of three sparse paragraphs devoid of any meaningful legal reasoning or analysis of the issue—apparently expecting us to look to the briefs filed in *Banyan 2, supra,* G045797, to ascertain the facts and arguments pertaining to this issue. Although we would generally consider the argument waived for lack of any meaningful analysis (*Badie, supra*, 67 Cal.App.4th at pp. 784-785; *Kim, supra*, 17 Cal.App.4th at p. 979), we will address in this appeal whether the original finding was supported by the record. We conclude the original finding was warranted and the Grammer Limited Partnerships' failure to litigate the alter ego issue in phase 4 constituted an abandonment of that issue. In *Banyan 2, supra*, G045797, we separately consider the trial court's postjudgment order granting the Grammer Limited Partnerships a new trial on this issue and striking the abandonment finding from the statement of decision.

We begin with a summary of the facts pertinent to this issue. The first amended complaint filed in April 1999, and each subsequent version of the complaint including the operative sixth amended complaint, contained extensive allegations that each corporate defendant (IBT and SCSD) was a sham corporation and each was Baer's alter ego. The 2004 trial status order set forth the order in which the case would be tried. The second phase would cover the claims of the Grammer Limited Partnerships "*except alter ego* and punitive damages." (Italics added.) Later phases would consider the claims of the remaining non-Grammer plaintiffs, issues relating to the relationship of Tedder and Baer and dissolving their joint venture, any remaining claims and cross-claims, followed by alter ego claims, punitive damages claims, and any remaining matters.

After the phase 2 trial took place, but before the phase 2 statement of decision was completed, Judge Jameson retired. The Presiding Judge of the Superior Court requested the Chief Justice of the Supreme Court allow Judge Jameson to return on assignment in this case for the following hearings/events scheduled for March 9, 2005, "statement of decision; [p]roposal of plaintiff to revise Court's ruling." Accordingly on February 17, 2005, the Chief Justice assigned Judge Jameson to sit on March 9, 2005, "and until completion and disposition of all causes and matters heard pursuant to this assignment." On March 11, 2005, the Chief Justice again assigned Judge Jameson to sit on April 6, 2005, "and until completion and disposition of all causes and matters heard pursuant to this assignment." Judge Jameson issued his phase 2 statement of decision on August 30, 2005, in which he found IBT and SCSD liable on five promissory notes Baer had signed on their behalf. (Baer's motion for judgment on the breach of contract cause of action was granted after Judge Jameson issued his ruling, but before he signed the final phase 2 statement of decision.)

In their statement of issues for the 2010 phase 4 trial before Judge Colaw, the Grammer Limited Partnerships stated their contract claims had been resolved in phase 2 and there were "[n]o remaining issues for trial: This claim was fully tried in prior phases. Plaintiffs prevailed on some loan claims, Defendants prevailed on others." The only remaining issues were as to their remaining 10th cause of action for breach of fiduciary duty. The statement made no mention of alter ego issues remaining to be tried. The trial court's phase 4 tentative ruling was issued on October 18, 2010, stating this was the "final" phase of trial. It ruled in Baer's favor, declared Baer the prevailing party, and directed Baer's attorneys to prepare the formal statement of decision. Although the court's tentative ruling made no specific mention of the alter ego allegations, the proposed statement of decision stated: "All causes of action in all complaints and cross-complaints not adjudicated in prior phases were all at issue in [phase 4]. . . . *Moreover, the named plaintiffs sought to prove Baer was and is the alter ego of IBT and SCSD. However, prior to trial . . . plaintiffs filed their [phase 4 statement of issues] in which [they] affirmatively abandoned all of their causes of action and claims except for [b]reach of [f]iduciary [d]uty against Baer. As a result of their affirmative abandonment of all but one of their remaining causes of action, [p]laintiffs produced no* *evidence and sought no relief for any other cause of action or claim at issue in [phase 4]*." (Italics added.)

The Grammer Limited Partnerships filed objections to the proposed statement of decision, including to the finding they abandoned alter ego claims. They asserted there was no evidence supporting the finding because they could pursue Baer as an alter ego of his corporations by way of a postjudgment motion to amend the judgment under Code of Civil Procedure section 187, and such a motion would be "in the exclusive jurisdiction of retired Judge Jameson, who presided over the phase 2 trial." The trial court signed the statement of decision as proposed by Baer and it was entered on February 24, 2011.

On March 29, 2011, the Grammer Limited Partnerships filed a motion for new trial asking the court to strike the finding they abandoned their alter ego claim and allow the alter ego issue to be litigated. The Grammer Limited Partnerships' attorney declared he believed attorney fees and alter ego claims relating to the phase 2 breach of contract claims on which the Grammer Limited Partnerships prevailed were to be decided postjudgment by retired Judge Jameson because his assignment by the Chief Justice (six years earlier) stated it was to last "until completion and disposition of all causes and matters heard pursuant to [these] assignment[s]." Moreover, Hartmann declared, after the phase 4 statement of decision was signed, he attempted to schedule his motions before Judge Jameson, but was informed Judge Jameson now had a conflict. Apparently, in unrelated litigation that took place several years after Judge Jameson retired, Baer's counsel, David A. Robinson, and opposing counsel in that case selected Judge Jameson from a list of two retired judges proposed by the trial court to act as a provisional neutral director of the corporation involved in the litigation.

The trial court entered the final judgment in this case on May 31, 2011. On July 19, 2011, the trial court ruled on the Grammer Limited Partnerships' new trial motion. The trial court rejected any suggestion by the Grammer Limited Partnerships that Baer's counsel, Robinson, had done anything wrong or intentionally interfered with Judge Jameson's ability to hear postjudgment motions pertaining to the contract issues that were tried in phase 2. Nonetheless, because of the confusion about whether the alter ego issue was a matter within Judge Jameson's "sole jurisdiction to decide" as a post phase 2 trial matter, the trial court granted the new trial motion as to the Grammer Limited Partnerships' request to strike the finding they had abandoned their alter ego claim. Baer filed a separate notice of appeal from that order and in that appeal he largely argues the trial court lost jurisdiction to grant new trial. (*Banyan 2, supra,* G045797.)[10]

We reject the Grammer Limited Partnerships' argument the original finding in the phase 4 statement of decision they abandoned their alter ego claims was not supported by substantial evidence. They contend their claim Baer was an alter ego of his corporations was one which, at their option, could be either litigated directly during trial *or* litigated by way of a postjudgment motion to amend the judgment under Code of Civil Procedure section 187 to add Baer as an additional judgment debtor. Moreover, they contend such a postjudgment motion would have been within the sole jurisdiction of Judge Jameson who presided over the phase 2 trial. Thus their failure to put on any evidence relating to the alter ego claim at the final phase of the trial could not constitute an abandonment of that claim.

The Grammer Limited Partnerships' argument is based on a faulty premise: i.e., that they had the "option" to simply ignore their own pleadings and litigate the alter ego issue when and as they pleased. Contrary to the Grammer Limited Partnerships' assertion below that alter ego liability is almost always raised by way of a motion to amend the judgment, "The alter ego issue is *ordinarily raised by the pleadings,* either

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[10] On September 30, 2011, the Grammer Limited Partnerships filed a motion to amend the judgment to add Baer as a judgment debtor. The trial court stayed ruling on that motion until these appeals are resolved. The Grammer Limited Partnerships petitioned this court for writ relief from the stay, which we denied without opinion. (*Banyan Limited Partnership et al. v. Superior Court* (Dec. 29, 2011, G046154).

affirmatively in the complaint [citation] or negatively in the answer [citation]. Nonetheless, even *when not pleaded*, that issue may be resolved at trial [citations], at a hearing to determine the true identity of the judgment debtor [citations], or even in a separate action subsequent to the action against the fictitious corporate defendant." (*Hennessey's Tavern, Inc. v. American Air Filter Co.* (1988) 204 Cal.App.3d 1351, 1358, italics added.)

A motion under Code of Civil Procedure section 187 is generally brought to add a *nonparty* to a judgment for collection purposes, when the judgment creditor has been unsuccessful in its efforts at collecting on the judgment against the named judgment debtor. (See *Leek v. Cooper* (2011) 194 Cal.App.4th 399, 419 ["[u]nder some circumstances a judgment against a corporation may be amended to add a *nonparty alter ego* as a judgment debtor" (italics added)].) "Occasionally, a judgment creditor obtains a judgment against a corporation only to discover later that the corporation has few or no assets and is controlled by a *nonparty alter ego*. In this event, the judgment creditor may be able to amend the judgment to add the alter ego as a judgment debtor and enforce the judgment against that debtor (who, presumably, has assets). [Citation.] [¶] A California court may use 'all the means necessary' to carry its jurisdiction into effect. [(Code Civ. Proc., § 187 . . . .)] [¶] This includes amending a judgment against a corporation to add a nonparty alter ego as a judgment debtor. [Citations.] [¶] The amendment does not add a new defendant; it merely sets forth *the true name* of the *real defendant*. [Citations.]" (Ahart, Cal. Practice Guide: Enforcing Judgments and Debts (The Rutter Group 2013) ¶¶ 6:1564-1565, p. 6G-74.)

The equitable postjudgment procedure permitted by Code of Civil Procedure section 187 is not simply an alternative means of litigating an issue pleaded in the complaint against a named party to the action. Indeed, cases have held that when a judgment creditor was aware of alter ego relationship *before* trial, amendment of the judgment to add the known alter ego was not appropriate. In *Jines v. Abarbanel* (1978)

77 Cal.App.3d 702, 717, the court held a trial court erred by amending a judgment against a doctor to add his professional corporation as a judgment debtor because the plaintiff was aware of corporation's existence before trial: "Nothing was irregular, nothing was concealed. Plaintiffs' attorneys concede they were aware of the existence of the corporation before the case was tried. [¶] There was no legal basis for the postjudgment order adding the corporation as a judgment debtor." (*Ibid.* See Ahart, Cal. Practice Guide: Enforcing Judgments and Debts, *supra*, ¶ 6:1573, p. 6G-78 ["If the creditor learns of the alter ego's existence *before* trial, the complaint may be amended to add the alter ego as a party"].)

Greenspan v. LADT LLC (2010) 191 Cal.App.4th 486, does not compel a different result. In that case, plaintiffs sued several limited liability companies for breach of contract, and sued the manager of the companies (who had been the owner of the companies, but who had earlier transferred ownership of them to a trust), for different claims including breach of fiduciary duty. The manager was not sued for breach of contract and there were no alter ego allegations in the complaint. The case was arbitrated. Plaintiffs prevailed on the breach of contract cause of action against the companies, but the manager prevailed on the causes of action against him. The arbitration award was reduced to a judgment. After plaintiffs' unsuccessful efforts to collect on the judgment against the companies, they filed a motion to amend the judgment to add the manager as a judgment debtor. The appellate court concluded the manager could be pursued as an alter ego, even though he had prevailed in the arbitration. The manager had not been a party to the breach of contract cause of action, and thus, he did not prevail on the contract cause of action. (*Id.* at p. 507.) Additionally, the court observed when the case was arbitrated plaintiffs had no reason to suspect the manager was an alter ego of the corporations. (*Ibid.*)

But this is not a case in which the Grammer Limited Partnerships were unaware of Baer's identity or of their claim he is an alter ego of his corporations. He is not a third party being brought into the case only when it was discovered during the judgment collection process the judgment debtors did not have any assets. Indeed, the Grammer Limited Partnerships' alter ego claims have been front and center in their pleadings throughout this litigation, and the original trial scheduling order specifically referenced it as one of the issues to be tried in this case. Baer was sued for breach of contract and prevailed. The question of alter ego liability could have been pursued throughout the case, and yet it was not raised with the trial court for determination at the time of the phase 4 trial, which was to be the final phase of the litigation. Under the circumstances, the finding the Grammer Limited Partnerships had abandoned their alter ego claim was warranted.

DISPOSITION

The judgment is affirmed. In the interests of justice, each side shall bear their own costs on appeal. (Cal. Rules of Court, rule 8.278(a)(5).)

O'LEARY, P. J.

WE CONCUR:

RYLAARSDAM, J.

BEDSWORTH, J.